

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

JUN 18 2002

TENTH CIRCUIT

PATRICK FISHER
Clerk

LESLIE R. LEWIS, an individual,

Plaintiff - Appellant,

v.

STATE OF OKLAHOMA ex rel.
BOARD OF REGENTS FOR TULSA
COMMUNITY COLLEGE; DEAN P.
VAN TREASE, as President of Tulsa
Community College and individually;
WILLIAM SUTTERFIELD, as Senior
Executive Vice President and Chief
Operating Officer of Tulsa Community
College and individually; C. GARY
CROOMS, as Vice President of
Business and Auxiliary Services of
Tulsa Community College and
individually; PAT FISHER, as
Director of Personnel of Tulsa
Community College and individually;
L. JEANNIE SHORE, as Director of
Financial Aid and Veterans Services
of Tulsa Community College and
individually,

Defendants - Appellees.

FILED
JUL 15 2002
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 01-5003
(D.C. No. 99-CV-564-X)
(N. D. Oklahoma)

ORDER AND JUDGMENT*

A true copy
Teste

Patrick Fisher
Clerk, U.S. Court of
Appeals, Tenth Circuit

By

Deputy Clerk

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

99

Before **TACHA**, Chief Judge, **GARTH**** and **EBEL**, Circuit Judges.

Plaintiff-Appellant, Leslie Lewis, appeals the district court's grant of summary judgment to Defendants-Appellees, Board of Regents for Tulsa Community College ("TCC"), Dean Van Trease, William Sutterfield, Gary Crooms, and Pat Fisher (collectively "Appellee"), on her Title VII, Equal Pay Act, and § 1983 claims. TCC employed Lewis from 1989 to July 1998, when it terminated her employment. Lewis alleged sex discrimination resulting in disparate treatment with respect to her pay and working conditions, as well as retaliatory discharge for her efforts to secure equal pay. The magistrate judge recommended summary judgment for Appellee on all of Lewis's claims, and the district court adopted the magistrate judge's findings and recommendation. On appeal, Lewis challenges that decision by the district court, as well as other evidentiary determinations it made. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

BACKGROUND

** Honorable Leonard I. Garth, Circuit Judge, United States Third Circuit Court of Appeals, sitting by designation.

The parties are familiar with the facts, so we will only sketch them generally here, and note the relevant pieces of evidence when discussing the merits of each claim. From 1989 until early 1997, Lewis worked as a Clerk in the Veteran Services department at TCC with Douglas Willis, who worked as an Assistant. With respect to all of her discrimination claims, Lewis compares her work responsibilities and pay with those of Willis. Lewis earned less money than Willis did and alleges that she shouldered additional duties beyond that of a Clerk. On several occasions, Lewis made internal complaints to her supervisor and the director of personnel about these discrepancies in pay and responsibility.

In January 1997, Lewis was reclassified as an Assistant but her salary remained unchanged. At the time of this promotion, she was earning more as a Clerk than the entry level salary for an Assistant, but still less than Willis. In December 1997 and January 1998, Lewis renewed her complaints about the salary discrepancy, but to no avail.

In addition to her Veteran Services duties, Lewis performed some financial aid tasks, for which she received overtime pay. The most significant financial aid task she performed was processing student financial aid petitions, which entailed ordering academic transcripts and preparing cover sheets for the petitions. On the morning of July 7, 1998, Lewis's supervisor, Jean Shore, informed her employees that overtime pay would no longer be permitted in that department. (App. at 269.)

Lewis told Shore that she could not prepare the financial aid petitions without overtime compensation, and Shore responded that if Lewis could not finish the petitions during the regular work day, she should return them to Shore. (Id. at 269-70.) Lewis told Shore that she found it unfair that Willis received more money for doing less work, and that maybe it was time Lewis hired an attorney to help her get equal pay. (Id. at 270.)

Later that morning, Lewis returned a “pretty heavy” (id. at 268) stack of petitions to Shore, placed in alternating stacks depending on the work that remained to be done on them. (Id. at 265.) The stacks did not contain labels or notes indicating what stage of progress they were in, but Lewis attempted to explain to Shore what the different stacks were. (Id. at 265, 267.) Included in this stack were petitions that needed to be prepared prior to their review at the academic appeals committee meeting on Thursday, July 9. (Id. at 265.) Lewis had provided Shore with procedures for the processing of petitions in February 1998 (id. at 276), but did not explicitly inform Shore that morning of which petitions still needed to have transcripts ordered or cover sheets prepared prior to the committee meeting on Thursday. (Id. at 268.) Lewis and Shore’s exchange regarding the processing of the returned petitions was heated, and Shore referred to Lewis as unprofessional and “unbecoming” during this conversation. (Id. at 274.)

Around 4:30 p.m. that afternoon, Lewis returned to Shore's office. During that conversation, Shore discovered that transcripts still had to be ordered on several of the petitions, and accused Lewis of "sabotag[ing]" students. (*Id.* at 275.) Shore recommended to Gary Crooms, an executive vice president, that Lewis be terminated for insubordination connected with these events on July 7, 1998, specifically the manner in which Lewis handled transferring the files to her. On July 10, 1998, Lewis was terminated for "insubordination" and "neglect of [her] job duties." (*Id.* at 662.) Lewis filed discrimination claims with the EEOC on September 4, 1998.

DISCUSSION

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. See Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1313 (10th Cir. 1999). Summary judgment is appropriate if the pleadings, affidavits and other evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." Simms v. Oklahoma, 165 F.3d 1321, 1326 (10th Cir. 1999). "Summary judgment is appropriate if the evidence is such that no reasonable jury could return a verdict for the nonmoving party."

Bullington, 186 F.3d at 1313 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

I. Continuing Violation

We begin by establishing the relevant time frame for our inquiry. Lewis attempts to invoke a continuing violation analysis with respect to her Title VII claims for disparate treatment in working conditions and pay. To establish a continuing violation, a plaintiff must show that at least one discriminatory act happened within the applicable filing period, which in Oklahoma is 300 days for Title VII claims. See Martin v. Nannie & the Newborns, Inc., 3 F.3d 1410, 1414-15 (10th Cir. 1993). Upon such a showing, this court engages in a three-factor inquiry to determine whether the acts prior to the limitations period constitute a continuing violation that includes the act or acts within the filing period. See id. at 1415. In examining the acts prior to the filing period, we consider (1) subject matter—whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence—“whether the nature of the violations should trigger an employee’s awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.” Id. Because “[t]he continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated,” id. at

1415 n.6, “a continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, she was being discriminated against at the time the earlier events occurred.” Bullington, 186 F.3d at 1311.

In this case, Lewis filed her Title VII complaint with the EEOC on September 4, 1998. Therefore, if we find that she can not establish a continuing violation, she will be allowed to recover only for acts on or after November 8, 1997, which is 300 days prior to her filing date. Construing the facts in favor of Lewis, we assume that she can meet the first two prongs of the continuing violation inquiry. Because her claim clearly fails the permanence prong, however, we believe that she has not demonstrated a continuing violation, thereby limiting her claims to acts that occurred within the 300 day filing period.

The facts demonstrate that Lewis certainly was aware of the discrimination in working conditions and pay that she alleges in her complaint. In her motion below opposing summary judgment, she stated as a material fact that in 1992 and 1994 she “specifically complained of the disparity in title, pay, responsibility, and work performed between herself and Willis to her supervisor.” (App. at 191.) Further, it is undisputed that in October of 1996, Lewis complained in writing to the personnel director, Pat Fisher, of the disparity in work actually performed by

Willis and herself, and about the “disparity in her title, pay and accountability.”

(Id. at 179-80.)

Lewis argues, however, that no one prong of the Martin test is dispositive, and that in Martin we allowed the plaintiff’s claim to survive summary judgment even though the third factor of permanence proved to be “more difficult” for the plaintiff. 3 F.3d at 1416. Therefore, Lewis contends that considering all three factors together, she has shown that there is a genuine issue of material fact of whether TCC’s course of conduct constitutes a continuing violation.

On the facts of this case, however, Lewis’s argument does not carry the day. Since the Martin decision, courts have focused on the permanence prong as the critical factor in determining whether the series of acts constitutes a continuing violation. As noted above, the Bullington court stressed that a claim “will likely fail” if the plaintiff knew, or should have known, that she was being discriminated against at the time of the discrimination. 186 F.3d at 1311. Indeed, that decision stated that the district court’s “emphasis on the third, ‘permanence’ factor was not inappropriate considering . . . the underlying purpose of the continuing violation doctrine.” Id. at 1311 n.4.¹ Here, Lewis complained on

¹ See also Bennett v. Quark, Inc., 258 F.3d 1220, 1227 (10th Cir. 2001) (“The district court properly concluded that the third factor—the permanence of the act—was fatal to plaintiff’s claim.”); Robbins v. Jefferson County Sch. Dist. R-1, 186 F.3d 1253, 1258 (10th Cir. 1999) (declining to evaluate the first two factors and holding “[s]ince [the appellant] failed to satisfy the permanence

three separate occasions, one of which was in writing, of the details of the alleged discrimination, demonstrating that she was aware of the need to assert her rights, yet failed to file a complaint with the EEOC until September 1998. Therefore, she can not establish that the events prior to November 8, 1997, are part of a continuing violation.

II. Title VII Claims

A. Disparate Treatment

On appeal, Lewis asserts that she was disparately treated with respect to her (1) working conditions; (2) pay;² and (3) termination. To succeed on these claims, Lewis must show that TCC acted with discriminatory intent or motive. See Bullington, 186 F.3d at 1315. Under the McDonnell Douglas³ framework, to establish a prima facie case, Lewis must show (1) she is member of a protected group, (2) she suffered an adverse employment action, and (3) similarly situated employees were treated differently. See Trujillo v. Univ. of Colo. Health Scis. Ctr., 157 F.3d 1211, 1215 (10th Cir. 1998). Upon such a showing, the burden of production, but not persuasion, shifts to the employer to demonstrate a “legitimate, nondiscriminatory reason” for the employment action. Reeves v.

requirement, she has not shown the existence of a continuing violation.”).

² Lewis also brings a claim under the Equal Pay Act, which we discuss infra at III.

³ McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000). If the employer offers such a nondiscriminatory reason, then the presumption of discrimination disappears, and the plaintiff bears the burden to show that the employer's proffered legitimate reasons were "not its true reasons, but were a pretext." Id. at 142-43. A "prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability." Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230 (10th Cir. 2000) (quoting Reeves, 530 U.S. at 149).

1. Working Conditions

Lewis alleges that she received disparate treatment with regard to work responsibilities and assignments, hours, and discipline. Taking the last allegation first, other than the events surrounding her dismissal, Lewis does not allege any facts to show that she was disciplined at all. She asserts many complaints about TCC's application of its discipline policy, yet they all relate to TCC's failure to discipline Willis for his alleged laziness, as opposed to improperly disciplining Lewis. The failure to discipline Willis is immaterial in light of Lewis's failure to show that she was disciplined.

Lewis's claim that she shouldered additional work responsibilities compared to Willis is similarly unavailing. Assuming, without deciding, that Lewis and Willis were similarly situated for the relevant limitations period, Lewis

has failed to show that she was subject to an “adverse employment action” that would satisfy her prima facie case. The Supreme Court has defined an “adverse employment action” as one that “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (emphasis added).

This court has held that, although it takes a “case-by-case approach” and liberally defines the phrase “adverse employment action,” it will not consider “a mere inconvenience or an alteration of job responsibilities” to be an adverse employment action. Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 (10th Cir. 1998) (internal quotation marks omitted). In this case, Shore assigned Lewis additional responsibilities associated with the Financial Aid department that Lewis previously had volunteered to help out with and for which she received overtime pay. (App. at 181.) Such a modification and addition of job responsibilities do not rise to the level of an adverse employment action. Rather, they constituted reasonable additional job requirements, and Lewis was instructed that if she could not perform all of her tasks within the regular working day, she

should return the work to Shore.⁴ Accordingly, she has not demonstrated that she suffered an adverse employment action with respect to her working conditions.

2. Pay

The district court assumed, without deciding, that Lewis and Willis were similarly situated for the relevant time period after November 8, 1997, and that Lewis had therefore established her prima facie case for disparate pay. However, the court found that Lewis had not carried her burden of showing that TCC's proffered reasons for the difference in pay were unworthy of belief, and therefore granted summary judgment to Appellee on this claim.

As stated earlier, upon Lewis's promotion to an Assistant, TCC did not change her salary, which was higher than the salary for an entry level Assistant but less than Willis's salary. TCC offered the following reasons for the disparity in pay upon her promotion: (1) Willis was hired as an Assistant in December 1989, and that position had a higher entry level of pay than the Clerk position Lewis occupied until her promotion in 1997 and (2) TCC has a practice of not increasing an employee's pay upon promotion to a new position, if they are currently earning a higher wage than the entry level wage for the new position.

⁴ Thus, Lewis was not asked to work overtime, nor was she asked to do work for which she would not be compensated for her additional hours of work. Instead, she was to receive regular pay for a regular day of work.

Because Lewis was already earning \$8.75 an hour, she did not receive an increase in pay, as the starting salary for entry level Assistants was \$8.02.

In this case, Lewis has not demonstrated “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions” in TCC’s proffered reasons to render them unworthy of credence. Bullington, 186 F.3d at 1317 (internal quotation marks omitted). Lewis advances two arguments that TCC’s proffered reason of not raising salaries upon promotion was pretext. First, Lewis states that this reason is inconsistent with TCC’s written policy.⁵ Second, she claims that the district court disregarded “critical evidence” that Bob Tally, her supervisor at the time of her promotion, believed her salary would be equalized with Willis’s upon her promotion.

Lewis is correct that one way in which an employee may show pretext is “with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances.”

⁵ Lewis points to the following statement in TCC’s Policy Manual to support her argument:

When a classified employee is assigned to a position with a higher classification, he shall be placed on the new salary classification at a level which provides for salary increase that is not less than the next higher step in his present classification.

(App. at 895.)

Kendrick, 220 F. 3d at 1230. The Kendrick opinion, however, included an important caveat to this basis for showing pretext.

This court has noted, however, that where “the alleged procedural irregularity disadvantaged all potential applicants” for a promotion, rather than just members of a protected class, the fact that a company failed to follow its own procedures “does not suggest either that the defendant’s proffered reasons for its employment decisions were pretextual or that the defendant was motivated by illegal discrimination.”

Id. at 1230 n.9 (quoting Randle v. City of Aurora, 69 F.3d 441, 455 n.20 (10th Cir. 1995)).

In this case, TCC presented evidence to the district court that it has been its actual practice for the past ten years not to raise an employee’s salary upon a change in position unless he or she is currently making less than the entry level salary of the new position, and that adherence to the written policy is impossible, as TCC does not maintain different salary “steps” within each classified position. Further, TCC presented evidence of twelve other employees, five women and seven men, who also did not have their salary raised upon promotion because their salary at the time of promotion was higher than the entry level salary for their new position.

This evidence falls within the Kendrick exception to the showing of pretext based on a deviation from written policy. The procedural irregularity disadvantaged all twelve employees promoted, not just a protected class.

Therefore, TCC's deviation from its written policy does not suggest that its proffered reasons for failing to raise Lewis's pay were pretextual.⁶

We find Lewis's claim regarding Tally's testimony⁷ to be without merit. His deposition is far from clear that Lewis's salary should have been equalized, nor does it indicate that failure to increase her salary would represent a departure from TCC's established practice. In fact, his testimony reflects that he was aware of the effect that her seniority level and current pay could have on the

⁶ We note the differences between this case and Goodwin v. Gen. Motors Corp., 275 F.3d 1005 (10th Cir. 2002). First, the procedural postures of the cases differ because the district court in Goodwin refused to recognize the plaintiff's lower pay as an element of her prima facie case of pay discrimination, claiming that such a claim was time-barred. Here, however, the district court found that Lewis had established her prima facie case, but had failed to show pretext. Compare Goodwin, 275 F.3d at 1009, with Magistrate's Recommendations at 8. The cases also differ factually. In Goodwin, General Motors stated that "there are no set rates for employees entering specific positions" and that "[s]alaries are not dictated by an employee's seniority with the company," 275 F.3d at 1008, factors that in this case the defendant asserted do bear on an employee's salary in a given position.

⁷ The relevant portion of Tally's testimony is as follows:

- Q: Okay. That you're aware, was [Lewis's] pay ever-made equal to [Willis's]?
- A: I thought it had, but now honestly, I don't know whether it was or not. Again, part of that has to do with Leslie's seniority. She had already worked up, based on her seniority, to a salary which was greater than entry level for this new position. . . . I had understood that there was a formula in personnel that they would go through to try to equalize something, but again, [Lewis] was already far and above the entry level for this position.

(App. at 242-43) (emphasis added).

determination of her new salary. Therefore, we conclude that Lewis has not demonstrated that TCC's proffered reason for the pay disparity is pretextual.

3. Termination

Lewis failed to argue before the district court that she was discharged because she was a member of a protected class, advancing only her retaliation claims in connection with her termination. On appeal, however, Lewis claims that her termination constitutes disparate treatment in violation of Title VII. Because Lewis did not make this argument below, and offers no reason for us to depart from our standard practice, we do not consider it.⁸ See Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992) (articulating general rule that a federal appellate court does not consider an argument that party failed to raise below).

B. Retaliation

Finally, Lewis contends that she was terminated because she threatened to obtain an attorney to help her obtain equal pay. Before analyzing the merits of this claim, we pause to address some of the district court's related evidentiary determinations that Lewis challenges on appeal.

⁸ As discussed infra, even if this argument had not been waived, Lewis failed to show that TCC's proffered reason for her termination was pretextual. Therefore, Lewis would not have been able to survive summary judgment on a disparate treatment claim with respect to her termination.

1. Evidentiary Issues

This court reviews a district court's determination of whether to admit or exclude evidence for abuse of discretion. See McCue v. Kansas Dep't of Human Res., 165 F.3d 784, 788 (10th Cir. 1999).

Lewis contends that the district court abused its discretion in admitting Crooms's affidavit, wherein he states that his conversation with Shore during which she recommended Lewis's termination took place on Wednesday, July 8, 1998. Lewis argues that this affidavit creates a sham fact issue because it conflicts with Crooms's earlier deposition testimony, wherein he stated that his conversation with Shore may have taken place on Tuesday, July 7. Therefore, according to Lewis, the district court should not have admitted it into evidence. We find that the district court did not abuse its discretion in admitting Crooms's affidavit because his deposition testimony reflects confusion as to the actual day of his conversation.⁹ Further, the substance of Crooms's conversation with Shore

⁹ The relevant portion of the deposition follows:

Q: Okay. When did [Shore] first approach you with any problem she was experiencing with [Lewis] during the week of July 6th through 10th?

A. [Crooms] I don't know the exact day. She gave me a call and told me that she had a serious problem with Leslie Lewis' insubordination, not doing some files and jeopardizing 100 plus students' academic eligibility.

(App. at 1037 (emphasis added).)

reflects her dissatisfaction with the manner in which Lewis informed her of the remaining work on the petitions, suggesting that Shore did not speak with Crooms until after her conversation with Lewis on Tuesday evening, and consistent with Crooms's affidavit that the conversation took place on Wednesday.

Lewis also urges us to conclude that the district court abused its discretion in holding that her argument concerning the timing of the decision to terminate her was waived and without merit. In her objections to the magistrate's recommendations, Lewis argued for the first time that Shore made the decision to terminate her prior to the alleged discovery of the incomplete status of the petitions. We reject Lewis's argument that her objections to the magistrate's report presented additional facts, as opposed to raising new issues or arguments. Lewis's entire argument before the magistrate judge focused on the theory that her return of the unfinished petitions was not egregious enough to merit dismissal, not that Shore made the recommendation to terminate her prior to their conversation Tuesday night.¹⁰ Because issues not raised before the magistrate judge are waived, Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996), the

¹⁰ In fact, Lewis admitted in her motion before the magistrate opposing summary judgment that “[f]ollowing the events of July 7, 1998, Shore recommended that plaintiff's employment with TCC be terminated.” (App. at 188) (emphasis added).

district court did not abuse its discretion in holding that Lewis had waived her timing argument.

2. Merits

To prevail on her retaliatory discharge claim, Lewis must establish that the decision to terminate her resulted from retaliatory animus. Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1243 (10th Cir. 1999). In the absence of direct evidence of retaliatory animus, plaintiffs may make such a showing through the burden shifting structure established in McDonnell Douglas. See Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 549-50 (10th Cir. 1999). To establish a prima facie case, Lewis must show: (1) she engaged in protected activity; (2) she suffered adverse action by the employer subsequent or contemporaneous with such activity; and (3) a causal connection existed between the employee's activity and the employer's adverse action. See Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1394 (10th Cir. 1997).

In viewing the evidence in the light most favorable to Lewis, the district court found that she had established her prima facie case. We will assume, without deciding, that her statement on July 7, 1998, that it was time she get an attorney to help her obtain equal pay represents an "unofficial assertion of rights through complaints at work," which this court has held to constitute protected activity. See Love v. Re/Max of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984).

On July 10, TCC terminated Lewis's employment, satisfying the requirement of an adverse employment action. Because the termination happened within days of Lewis's statement that she should get a lawyer, the district court assumed *arguendo* that Lewis had shown a causal connection between the events, sufficient to establish her *prima facie* case. This court has stated that a termination "very closely connected in time to the protected conduct" can satisfy this burden standing alone. See Conner, 121 F.3d at 1395.

Once a plaintiff has established her *prima facie* case, the burden of production then shifts to the employer to show a legitimate reason for the plaintiff's termination. See id. at 1394. In this case, Shore stated her main reason¹¹ for recommending Lewis's termination was that Lewis had jeopardized students' financial aid appeals by returning the petitions without informing her of which ones needed immediate attention.

In evaluating whether an employer's proffered reasons are pretextual, the relevant inquiry is not whether those reasons are "wise, fair or correct" but whether "[the employer] honestly believed those reasons and acted in good faith upon those beliefs." Bullington, 186 F.3d at 1318. Lewis offers the following arguments for why TCC's reasons for her termination are pretextual: (1) she

¹¹ Shore's other stated reason was that Lewis arrived late for work on the morning of July 8, 1998. Lewis does not address this reason in her brief, however, so we have focused only on the return of the financial aid petitions.

presented the incomplete petitions to Shore in an orderly fashion with an explanation of the different stacks; (2) no harm actually came of the events of July 7 because all of the petitions were completed prior to the committee meeting on July 9; (3) Shore informed Crooms of Lewis's threats to retain a lawyer; and, she states "more importantly" to her argument (Aplt Br. at 39), (4) Shore made her recommendation to terminate Lewis prior to events on the evening of July 7, 1998. As discussed above, Lewis waived her timing argument by neglecting to raise it before the magistrate, and it fails in any event in light of Crooms's affidavit.

In her deposition, Lewis stated that when she presented the files to Shore, she did not inform her of the immediate action that had to be taken on some of the petitions by the meeting on Thursday: that transcripts had to be ordered and cover sheets prepared. Lewis also testified that when she told Shore Tuesday evening that transcripts still had to be ordered for numerous petitions, Lewis found Shore to be "upset" and "confused" by her actions. (App. at 275.)¹² By her own admission, Lewis understood that Shore was unaware that transcripts needed to be ordered for the petitions until Lewis informed her of this Tuesday evening. (Id. at

¹² Lewis stated that Shore told her "I can't believe you're just now telling me that the transcripts need to be ordered," and that Shore said "I can't believe you'd sabotage students and you're just now telling me this." (App. at 275.)

276.)¹³ This evidence reflects that Shore was upset by Lewis's actions, regardless of whether Lewis thought that she had explained clearly what work remained to be done on the petitions. As this court explained in Shorter v. ICG Holdings, Inc., 188 F.3d 1204 (10th Cir. 1999), "[i]t is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of [her] own relative performance." Id. at 1209. Similarly, it is irrelevant that no harm actually came of the delay in processing petitions, if on Tuesday evening and the following day Shore believed that the students' applications would be jeopardized. Lewis has not produced sufficient evidence from which a rational juror could conclude that Shore did not "honestly believe" that students' petitions were jeopardized and that she did not act in good faith on those beliefs. Therefore, both Lewis's first and second reasons fail to show that TCC's reason for terminating her was pretextual.

Lastly, Lewis places little weight on her argument that Shore's comment to Crooms regarding Lewis's threat to sue TCC somehow demonstrates pretext. We, like the district court, assume arguendo that Lewis demonstrated a causal connection between Lewis's comment to Shore about retaining an attorney and

¹³ Lewis also testified that she was "surprised" that no one had come to her during the day on Tuesday to ask her for help on the petitions, and that the petitions were still on Shore's desk when she returned that evening. (App. at 276.)

Shore's recommendation to terminate her because of their temporal proximity in establishing her prima facie case. However, Shore's comment to Crooms does not show that Shore's reason for recommending Lewis's termination is unworthy of belief. Given Shore's, Crooms's, and Lewis's account of the week's events, Lewis has failed to demonstrate that TCC's offered reason for her termination was pretextual. Accordingly, the district court did not err in granting summary judgment to TCC on Lewis's retaliation claim.

III. Equal Pay Act

Lewis contends that she performed substantially the same work as Willis, yet was paid less than Willis on account of her gender, thereby constituting a violation of the Equal Pay Act, 29 U.S.C. § 206(d). To establish a prima facie case, Lewis must show (1) she was performing work which was "substantially equal" to that of male employees considering skills, duties, supervision, effort, and responsibilities of the jobs; (2) the conditions where work was performed were basically the same; and (3) male employees were paid more under the circumstances. Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1364 (10th Cir. 1997).

Like the district court, we find that Lewis failed to establish her prima facie case under the statute for her time prior to becoming a Veteran Services Assistant because she has not demonstrated that she performed work "substantially equal"

to that of Willis. Lewis argues that the work she performed was substantially equal because she trained Willis upon TCC hiring him, she often had to correct his work product for errors, and she was held equally accountable for those errors. However, all of these responsibilities pertain to the processing of paperwork, which falls under Lewis's primary function as a Clerk, whereas Willis's primary function as an Assistant was to counsel students. Although Lewis participated in the selection and direction of work study students, a responsibility of the Assistant, she has not presented sufficient evidence to demonstrate that performing this task meant that her work was substantially equal to that of an Assistant. As we found in Sprague, performing only "some functions" of another position is insufficient to support Lewis's claim that she "occupied substantially the same position or performed substantially the same tasks" as her co-workers. Id. at 1364 (internal quotation marks omitted).

Assuming, as the district court did, that Lewis can establish her prima face case with respect to her employment as an Assistant, the burden then shifts to TCC to show that the wage disparity existed for one of four reasons: "(1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; [or] (4) a disparity based on any factor other than sex." Tidwell v. Fort Howard Corp., 989 F.2d 406, 409 (10th Cir. 1993). Unlike in Title VII cases, the burden of persuasion is on the employer to show one of these reasons, and if it

fails to do so, the plaintiff will prevail on her prima facie case. See Sprague, 129 F.3d at 1364.

As discussed in the Title VII section, TCC asserted that the pay disparity between Lewis and Willis resulted from the following factors: (1) Willis was hired in the position several years prior to Lewis's promotion and (2) TCC has a policy of not increasing employees' salaries upon promotion if they are already higher than the entry level salary for the new position. Because TCC has carried its burden of showing that the pay disparity resulted both from seniority in the position and a factor other than sex (its entry level salary policy), it was entitled to summary judgment on Lewis's EPA claim.

IV. § 1983 Claims

Lastly, Lewis contends that her termination deprived her of a constitutionally protected property right, thereby violating 42 U.S.C. § 1983. Both parties agree that Lewis was employed without a written contract. Oklahoma follows an at-will employment doctrine, and thus, in the absence of an express or implied contract to the contrary, an employer may terminate an employee at any time "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong." Black v. Baker Oil Tools, Inc., 107 F.3d 1457, 1461 (10th Cir. 1997) (interpreting Oklahoma state law) (internal quotation marks omitted).

Lewis contends that an implied contract existed based on TCC's employee handbook. Specifically, she claims that TCC's Affirmative Action Plan ("AAP") created a legitimate entitlement to her continued employment and prevented her from being terminated for discriminatory reasons. However, she has failed to demonstrate that she was terminated because of gender discrimination in violation of Title VII, and therefore, her argument that TCC violated its AAP and deprived her of a protected property interest when it terminated her fails as well. In addition, she has failed to demonstrate that an implied employment contract existed between herself and TCC based on the employee handbook because she did not supply any separate consideration for her claimed right to job security under the handbook. See Black, 107 F.3d at 1464 ("Based on our finding of no sufficient consideration, we find that no contract was created by the [manual]."). Therefore, the district court properly granted summary judgment to TCC on Lewis's § 1983 claim.

CONCLUSION

We AFFIRM the district court's decision with respect to all claims raised.¹⁴

ENTERED FOR THE COURT

David M. Ebel
Circuit Judge

¹⁴ Because we affirm the district court's grant of summary judgment with respect to all claims, we also affirm that court's determination that Lewis's motions in limine were moot.

United States Court of Appeals for the Tenth Circuit
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303)844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Jane B. Howell
Chief Deputy Clerk

July 10, 2002

RECEIVED
JUL 15 2002
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Mr. Phil Lombardi
Clerk
United States District Court for the N. District of Oklahoma
333 W. Fourth Street
Room 411 United States Courthouse
Tulsa, OK 74103

Re: 01-5003, Lewis v. State of Oklahoma ex
Dist/Ag docket: 99-CV-564-BU(M),

Dear Mr. Lombardi:

Enclosed for the clerk of the trial court or the named agency, is a certified copy of the order and judgment filed in this case which is issued as the mandate of this court. See Fed. R. App. P. 41(a). Please file it in the records of your court or agency.

The clerk of the district court is requested to acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be returned to you at a later date.

Please contact this office if you have questions.

Sincerely,

PATRICK FISHER
Clerk

By: *Paola Carter*
Deputy Clerk

PF:oac

cc:

- N. Kay Bridger-Riley
- Eric A. Mareshie
- Christopher Lincoln Camp
- Charles Michael Copeland
- James E. Weger
- C. Michael Copeland
- Thomas L. Vogt
- Jon M. Payne